

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

WESTERN UNION INTERNATIONAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

JOHN H. SHENEFIELD,
Assistant Attorney General,

BARRY GROSSMAN,
ANDREA LIMMER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. BRUCE,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JACK DAVID SMITH,
Counsel,
Federal Communications Commission,
Washington, D.C. 20544.

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OCTOBER TERM, 1977

No. 77-1318

WESTERN UNION INTERNATIONAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 74a-90a) is reported at 568 F. 2d 1012. The Designation of Investigation by the Federal Communications Commission (Pet. App. 3a-4a) is reported at 52 F.C.C. 2d 1014; the Commission's Final Decision and Order (Pet. App. 5a-13a) is reported at 63 F.C.C. 2d 761; and the Commission's Reconsideration and Action on Petitions to Reject and Suspend (Pet. App. 14a-70a) is reported at 66 F.C.C. 2d 517.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1977. The petition for a writ of certiorari was filed on March 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350(a).

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the finding of the Federal Communications Commission that differential rates charged by the American Telephone and Telegraph Company (AT&T) to certain international and domestic carriers were discriminatory rates for like services.
2. Whether the Commission's directive to AT&T to eliminate certain unlike charges for like services constituted a prescription of rates that could properly be made only after a full inquiry into the costs of service.

STATEMENT

1. International record carriers (IRCs)¹ transmit and receive overseas telecommunications by satellite and by submarine cable. Their international communications are funneled through five "gateway" cities in this country. In order to complete their international communications networks, the IRCs lease from AT&T both "intercity facilities" (lines that connect the gateway cities to each other) and "entrance facilities" (lines that join the operating centers to submarine cable heads and satellite earth stations). In the past, the rates charged to the IRCs for these connections were set by contract, rather than by tariff (Pet. App. 76a-80a).

Certain domestic specialized carriers² lease from AT&T the same type of intercity and entrance facilities that are

¹The largest IRCs are RCA Global Communications, Inc.; ITT World Communications, Inc.; petitioner Western Union International, Inc.; and TRT Telecommunications Corp. IRCs are licensed by the Commission to provide various communication services between the United States and overseas points (Pet. App. 77a).

²The domestic specialized carriers include terrestrial carriers, such as MCI Telecommunications Corp., and domestic satellite carriers such as RCA American Communications, Inc. They were licensed in the early 1970s to offer private line services to certain large customers. Although the Commission has regarded the specialized

used by the IRCs. These domestic carriers compete with AT&T in providing service to governmental and large commercial users. In 1974, after investigating complaints that AT&T was restricting the domestic carriers' access to certain circuits and that it was charging them discriminatory rates, the Commission ordered AT&T to provide the domestic carriers with access to those circuits at standardized rates. *Bell System Tariff Offerings*, 46 F.C.C. 2d 413, affirmed *sub nom. Bell Telephone Co. of Pennsylvania v. Federal Communications Commission*, 503 F. 2d 1250 (C.A. 3), certiorari denied, 422 U.S. 1026. See Pet. App. 78a-79a.

Following this order, AT&T and the domestic carriers entered into negotiations over the terms and conditions under which AT&T would offer the circuits in question. A Settlement Agreement reached at the conclusion of these negotiations established tariffs applicable to the AT&T circuits used by the domestic carriers, but the tariffs did not set rates for use of the facilities leased by the IRCs. The rates charged to the IRCs under contracts were lower than the rates set in the tariffs for domestic carriers (Pet. App. 79a).

2. In May 1975, at the same time as it accepted the Settlement Agreement, the Commission instituted a restricted rulemaking proceeding to determine whether AT&T should be permitted to continue leasing facilities to the IRCs under terms more advantageous than those offered to the domestic carriers (Pet. App. 3a-4a). The Commission stated that it appeared that there was "no

carriers as limited to providing private line services, one court has construed their authority more broadly. *MCI Telecommunications Corp. v. Federal Communications Commission*, 561 F. 2d 365 (C.A. D.C.), certiorari denied, January 16, 1978 (No. 77-436).

significant difference between the interconnection facilities provided to the IRCs and those provided under tariff to the specialized common carriers including domestic satellite common carriers" (Pet. App. 3a).

The IRCs then filed comments with the Commission, arguing that the differential rates were justified because of differences in the nature of the two communications networks. The facilities leased by the domestic carriers were distinguishable from the facilities leased by the IRCs, they argued, because the latter were part of an international network (Pet. App. 81a). The IRCs did not point, however, to any particular differences in physical facilities, functions, or costs of the two systems that might have justified the differential rate structure (*ibid.*).

The Commission found, after considering all of the parties' submissions, that the service provided to the IRCs is "essentially identical" to that provided to the domestic carriers and that no justification had been shown for charging different rates to the two groups (Pet. App. 9a). The Commission expressed concern that, as a result of the difference in the rate structures for the two systems, domestic customers might well be subsidizing international customers (*ibid.*). In addition, the Commission noted that as a result of the disparity, AT&T was able to charge higher rates to the domestic carriers, with which it directly competes, than to the IRCs, with which it does not compete (*ibid.*). Noting that neither AT&T nor the IRCs had made a sufficient showing to rebut the *prima facie* case of discrimination, the Commission concluded that the differential rates were discriminatory, in violation of Section 202(a) of the Communications Act, 48 Stat. 1070, as amended, 47 U.S.C. 202(a) (*ibid.*).

Accordingly, the Commission ordered AT&T to stop charging discriminatory rates to the two groups. The Commission did not order AT&T to institute any

particular rate for any service, and it expressed no opinion about how AT&T should eliminate the discrimination (Pet. App. 11a). The Commission provided, however, that if AT&T should offer its facilities to all carriers—domestic and international—on identical terms, it would not require the company to provide cost justification for the new rate "until such time as AT&T files full justification for the various [domestic carrier] facility offerings" (Pet. App. 11a n. 8).³

Following this order, AT&T requested and was granted four meetings with Commission staff personnel to discuss difficulties it was having in applying the Commission's order to a few highly unusual communications systems. These included the Washington-to-Moscow "Hotline," a Florida-Cuba cable circuit serving foreign diplomats in Havana, the Department of Defense's AUTOVON network, and a facility used by the National Aeronautics and Space Administration to track and monitor satellites (Pet. App. 82a). None of the discussions with the staff concerned the Commission's underlying decision; they dealt only with implementation (*id.* at 87a-88a).⁴

³This ruling was in effect an offer to waive the application of Section 61.38 of the Commission's rules, 47 C.F.R. 61.38, which requires that all rates be justified by underlying costs. A similar waiver had been granted to implement the Settlement Agreement, because AT&T had indicated that the cost justification materials would take some time to prepare. AT&T stated that it expected to have the cost justification information completed by December 1978 (Pet. App. 82a).

⁴These special systems were later discussed in the Commission's order on reconsideration. The Commission there held that the special systems were not governed by the original order, because that order concerned only systems subject to the general leasing contracts between AT&T and the IRCs. These unusual systems were provided for under special contractual arrangements and thus were outside the reach of the Commission's restricted rulemaking proceeding (Pet. App. 45a).

AT&T subsequently filed tariffs for the IRC interconnection circuits, choosing to eliminate the discrimination by raising the rates charged the IRCs to the level of those charged the domestic carriers. With respect to the issue of cost differences between the IRC and domestic facilities, AT&T represented that the facilities provided to the IRCs "are physically and essentially the same as those provided to domestic[s]. We cannot justify a lower charge to the IRC's" (Pet. App. 83a). The IRCs then filed petitions for reconsideration of the Commission's order and for rejection or suspension of the new tariffs.

3. On October 25, 1977, the Commission denied both sets of petitions (Pet. App. 14a-67a). Based on the entire record before it,⁵ the Commission again found that no party had demonstrated the existence of sufficient differences between the services furnished by AT&T to the domestic and international carriers to justify their classification as unlike services (Pet. App. 37a). The Commission again observed that the similarity of the services was apparent on the face of the applicable tariff and contract provisions. Both employed "voice-grade" circuits with similar bandwidths, and both performed essentially the same functions (Pet. App. 16a).

The Commission observed that AT&T had admitted that the facilities provided to the IRCs were physically and functionally the same as those provided to the domestic carriers (Pet. App. 32a n. 13). Concluding that

⁵The Commission considered the original decision in the case and the accompanying record, the IRCs' petitions for reconsideration, the IRCs' petitions opposing AT&T's proposed tariffs, all other miscellaneous letters and comments filed by the IRCs, AT&T's responses to the IRCs' petitions to reject, the summary of the meetings between AT&T and the Commission staff, and the summary of a public meeting held with all the parties on September 7, 1977 (Pet. App. 66a).

no cost-based justification had been offered—and no other justification had been shown—for charging different rates, the Commission reaffirmed its ruling that the disparity violated Section 202(a) of the Communications Act.

4. The court of appeals affirmed the Commission's order. The court concluded that the Commission's finding that the domestic and IRC facilities are "like" services is supported by substantial evidence. It remarked that, although the IRCs had been given ample opportunity to explore the allegedly unique characteristics of the IRC interconnection circuits, "no significant differences between the two systems came to light" (Pet. App. 86a).

The court also noted that the Commission's order required only that the domestic and IRC rates be "equalized—by whatever means," and that AT&T could achieve this end in ways other than by raising the IRC rates. Thus, "[i]t was *** open to AT&T to alter the rates it was charging the domestics by bringing them down to the fee levels charged in the IRC contracts" (Pet. App. 89a). Under these circumstances, the court concluded, the Commission could not be accused either of improperly abrogating the contracts between AT&T and the IRCs or of prescribing rates (*ibid.*).⁶

⁶The court also rejected the contention that the four meetings between AT&T and the staff had violated the Commission's rules prohibiting *ex parte* presentations, i.e., "communication[s] going to the merits or outcome of any aspect of a restricted proceeding." 47 C.F.R. 1.1201(f). The court found that "[n]othing said in these meetings was intended to affect the order itself in any manner, or to influence the Commission regarding the petition for reconsideration" (Pet. App. 88a). The court concluded, in addition, that the IRCs were not prejudiced by any of the matters discussed in those meetings (*ibid.*). Although petitioner takes issue with this aspect of the court's decision (Pet. 19), it does not include any matter concerning the *ex parte* communications in the questions presented (Pet. 3). We therefore do not discuss the matter further. There is, in any event, no need to add to the court of appeals' discussion of the point.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals, and it does not warrant further review.

1. The Communications Act makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges * * * for or in connection with like communication service." 47 U.S.C. 202(a). This prohibition "is flat and unqualified. * * * Equal prices for like services is in itself a matter of public interest." *American Trucking Associations, Inc. v. Federal Communications Commission*, 377 F. 2d 121, 130 (C.A.D.C.), certiorari denied, 386 U.S. 943.

Services are "like" within the meaning of Section 202(a) if they are functionally equivalent.⁷ The Commission properly concluded, on the basis of the ample evidence before it, that the services provided to the IRCS and to the domestic carriers are functionally equivalent. For five months it had monitored the carrier negotiations that resulted in the Settlement Agreements, in the course of which AT&T produced detailed descriptions of the relevant facilities. As was evident from the contracts and

⁷See *American Trucking Associations, Inc. v. Federal Communications Commission*, *supra*, 377 F. 2d at 127; *American Telephone and Telegraph Co. (Hi-Lo)*, 58 F.C.C. 2d 362, 363 (opinion on reconsideration), affirmed *sub nom. Commodity News Services, Inc. v. Federal Communications Commission*, 561 F. 2d 1021 (C.A.D.C.). Services using completely different technologies may be "like" services if they do not differ in any material functional respect. For example, "international services using satellites and cables; domestic message telecommunications service calls by satellite or terrestrial; domestic communications using coaxial cable, microwave radio, or other facilities are not offered as 'unlike' services at different rates." *Investigation into the Lawfulness of Tariff FCC No. 267, Offering a Dataphone Digital Service Between Five Cities*, 62 F.C.C. 2d 774, 796-797.

tariffs, the facilities for both the IRCS and the domestic carriers carry signals between the domestic network of AT&T and the specialized long-distance circuits of the other carriers. They employ similar circuits with similar bandwidths (Pet. App. 16a). Criteria of reliability appear to be similar. The Commission stated that "the entrance facilities in both cases permitted interconnection of either earth stations, microwave terminals, or cable heads to operating offices, and the intercity facilities in both cases permitted interconnections between and among operating offices in different cities" (*ibid.*). Moreover, AT&T confirmed that the facilities it was providing to the IRCS are essentially the same as those provided to the domestic carriers and that it could not show any cost justification for a lower charge to the IRCS (Pet. App. 32a).

The IRCS did not seriously dispute in the court of appeals the Commission's conclusion that the facilities are functionally similar (Pet. App. 86a), and they do not do so here. Instead, they argued that they have unique needs and that the facilities provided to them are unique because they are part of an international system. Both the Commission (Pet. App. 9a) and the court (Pet. App. 86a) found this argument unpersuasive. In so contending, they show only that the electronic signals are going to different destinations, but not that the facilities over which the signals travel are different in any way. The court therefore properly upheld the Commission's determination that the facilities were "like."

Petitioner contends, however, that the Commission was not entitled to order the elimination of different rates for "like" services until it had proved that no cost differences could account for the difference in rates (Pet. 10-13, 20-24). Because no cost data were before the Commission, petitioner maintains, the Commission could not conclude that the differential rates were "unjust or unreasonable"

and therefore could not upset the prevailing carrier-made rates. This argument fails because the Commission has no obligation to prove that a rate disparity for like services is unjustified; rather it is the carrier's obligation to justify a rate disparity. See *Trailways of New England, Inc. v. Civil Aeronautics Board*, 412 F. 2d 926, 932 n. 13 (C.A. 1); *American Trucking Associations, Inc. v. Federal Communications Commission*, *supra*, 377 F. 2d at 133. Proof that unlike rates are being charged for like services is a *prima facie* case of discrimination. And if, as happened in this case, the carrier does not provide a justification for the rate differential, the burden of establishing a justification falls to the party seeking the benefit of the differential rate. See *Copley Press, Inc. v. Federal Communications Commission*, 444 F. 2d 984, 988-989 (C.A.D.C.).

The IRCS did not satisfy this burden, for they offered no evidence at all. They rested entirely in the court of appeals on speculation that cost differences *might* justify the disparity and on the observation that AT&T had not completed preparing its final cost data. Because the IRCS did not argue before the Commission that the rate differential was cost-justified (Pet. App. 32a n. 13), the court properly declined to consider that issue for the first time on appeal (Pet. App. 87a).⁸ See 47 U.S.C. 405. In any event, the Commission's action was appropriate in light of the fact that the only evidence on the subject of cost justification was the statement by AT&T suggesting that none existed (Pet. App. 87a).

⁸Petitioner asserts (Pet. 12) that the court of appeals' statement is incorrect. But although in their petitions to reject or suspend the tariffs, the IRCS alluded to possible cost differences, they did so only to buttress their argument that before the rates could become effective AT&T should be required to file cost data pursuant to Section 61.38 of the Commission's rules, 47 C.F.R. 61.38. The Commission's response, to which petitioner refers, dealt with this matter thoroughly. But, as the court noted, the question of tariff legality is quite distinct from the question of discrimination (Pet. App. 87a n. 15), and the fact remains that the IRCS offered no cost justifications before the Commission.

2. Petitioner also contends (Pet. 16-20) that the Commission prescribed a rate⁹ without going through the proper statutory procedure for rate prescription. 47 U.S.C. 205(a). This argument, however, is based on the incorrect premise that the only way AT&T could comply with the Commission's order was to raise the IRC rates to the level of the domestic rates, and that the Commission therefore indirectly prescribed that rate for the service to the IRCS.

Contrary to petitioner's contention, the Commission did not coerce AT&T into filing a particular tariff.¹⁰ The Commission simply ordered AT&T to eliminate the disparate treatment of domestic carriers and the IRCS. AT&T could do so either by filing a new tariff or by some other means (Pet. App. 11a n. 8). As the court of appeals explained, "[i]t was thus open to AT&T to alter the rates it was charging the domestics by bringing them down to the fee levels charged in the IRC contracts" (Pet. App. 89a). In addition, there was nothing to prohibit AT&T from choosing an entirely new rate, so long as it either treated both sets of carriers equally, or to provide a

⁹A prescribed rate is a rate fixed by the agency from which the carrier cannot deviate without prior agency permission. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 386-387; *American Telephone and Telegraph Co. v. Federal Communications Commission*, 487 F. 2d 864, 874 (C.A. 2).

¹⁰This case has nothing in common with *Mobil Alaska Pipeline Co. v. United States*, No. 77-452, argued March 28, 1978, to which petitioner refers (Pet. 15, 16, 19). *Mobil Alaska* involves the question whether the Interstate Commerce Act authorizes the suspension of an initial rate for a new service and whether, if so, the Commission may announce in advance that it will not suspend rates lower than a certain level. There are no new rates for new services here, and the Commission did not announce in advance that AT&T should file one rate rather than another. There is therefore no reason to hold this case pending the disposition of *Mobil Alaska*.

cost justification for any disparity (Pet. App. 11a and n. 8).¹¹ Because AT&T had the discretion to file any rate it desired,¹² the Commission's action cannot be construed as a rate prescription. *Texas & Pacific Ry. Co. v. United States*, 289 U.S. 627; *National Association of Motor Bus Owners v. Federal Communications Commission*, 460 F. 2d 561, 565 (C.A. 2).¹³

¹¹The court observed that the Commission has instituted a hearing into the legitimacy of all the tariff rates for facilities provided by AT&T to both the domestic and the international carriers. Thus, the IRCs are in no danger of sustaining irreparable injury by paying the same rates as domestic carriers. If the hearing ultimately should reveal that those rates result in unduly high charges to the IRCs, they "would be able to recover over-charges plus interest. 47 U.S.C. §§ 208-09" (Pet. App. 87a).

This proceeding offers petitioner and the other IRCs a full opportunity to present to the Commission any available arguments about cost. It effectively reduces the order upheld by the court of appeals to no more than a stopgap pending the outcome of the cost investigation.

¹²Petitioner contends that the existence of the Settlement Agreement deprived AT&T of all options other than to increase the IRCs' rates to those established in that Agreement (Pet. 10, 18). But nothing in the Agreement bars a *reduction* in rates to domestic carriers, either to the low rates enjoyed by the IRCs or to any intermediate rate. The domestic carriers would hardly have objected to a decrease in their rates. And if the Settlement Agreement barred any rate *higher* than those fixed, then the IRCs are in no position to complain, for that interpretation would set a cap on the IRCs' rates. But however that may be, when the Commission ordered AT&T to eliminate the existing discrimination, explicitly refusing to express any opinion as to what "level of tariff charges, etc., AT&T should file to remove its inequitable treatment of carriers" (Pet. App. 11a), it superseded for the purposes of this case any limitations the Settlement Agreement or the Order accepting (but not approving) that Agreement (52 F.C.C. 2d 727, 732) may have put on AT&T's freedom to revise its rates.

¹³ As the court of appeals stated (Pet. App. 89a), the IRCs took the position with AT&T that the Commission's order had not prescribed any one rate but left AT&T discretion to take action other than raising the IRCs rates. Petitioner now takes the opposite view (Pet. 17).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

JOHN H. SHENEFIELD,
Assistant Attorney General.

BARRY GROSSMAN,
ANDREA LIMMER,
Attorneys.

ROBERT R. BRUCE,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JACK DAVID SMITH,
Counsel,
Federal Communications Commission.

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